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No.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

MARION KAPLAN,
PETITIONER,

v.

SAMUEL W. BLACK,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether the Massachusetts Courts and the United States District Court, by their adjudications, have deprived the Petitioner, Marion Kaplan, (Marion) of due process of law granted by the Fifth and Fourteenth Amendments by invoking the doctrine of *res judicata* as a result of a judgment rendered in earlier litigation, to which Marion was neither a party, nor represented expressly or impliedly.

2. Is Marion bound by the judgment in a prior case wherein she was a non-party, was not in privity with any of the parties, and was not given a full and fair opportunity to directly or vicariously participate in the presentation of evidence, trial strategy and argument?

3. Is the filing of Marion's present complaint estopped by the judgment in a prior complaint wherein the cause of action litigated in the prior complaint was to set aside a deed based upon mental incapacity, undue influence and fraud, which was of parallel and similar interest to Marion; the present action against her brother, Samuel Black, (Samuel) being one which is a claim for the breach of an advantageous relationship and was not in existence at the time of the prior litigation?

4. Whether the United States Court of Appeals for the First Circuit in refusing to set aside the District Court's decision erred by not allowing the invocation of Federal Constitutional issues which were first raised in the complaint filed with the United States District Court and as a result thereof depriving Marion of her constitutional rights to have her day in court.

5. Are the various United States District Courts and Courts of Appeal acting consistently as it relates to the doctrine of *res judicata*, in particular, the defense of collateral estoppel on matters which were not, or could not have been adjudicated at the time of the prior trial?

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Opinions Below.

The opinion of the United States District Court for the District of Massachusetts appears at Appendix A (A.1). The United States Court of Appeals for the First Circuit affirmed the judgment of the District Court in an opinion which appears as Appendix B (A.5). The opinion of the Superior Court of the Commonwealth of Massachusetts appears as Appendix C (A.8). The opinion of the Appeals Court of the Commonwealth of Massachusetts appears as Appendix D (A.15). The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts appears as Appendix E (A.17).

Jurisdiction.

The order and judgment of the United States Court of Appeals for the First Circuit were entered on July 26, 1982. *See*, Appendix B (A.5). This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

Constitutional Provisions.

U.S. Const. Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

Marion instituted this suit for breach of an advantageous relationship caused by her brother, Respondent, Samuel W. Black, (Samuel) and further alleging that the Courts of the Commonwealth of Massachusetts deprived Marion of her constitutional rights granted to her by the Fifth and Fourteenth Amendments. The Respondent, Samuel, moved to dismiss the complaint on *res judicata*, collateral estoppel and issue preclusion grounds, citing the prior decisions of the Courts of the Commonwealth of Massachusetts in *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978) and *Kaplan* v. *Black*, Mass. App. Adv. Sh. (1981) 1033, 421 N.E.2d 90. In a Memorandum and Order dated January 25, 1982, the United States District Court for the District of Massachusetts granted the Respondent's motion to dismiss. A notice of appeal was filed by the Petitioner on February 24, 1982. The Court of Appeals affirmed the decision of the District Court.

The Petitioner initially filed a suit in the Superior Court of the Commonwealth of Massachusetts alleging that the Respondent caused a breach of an advantageous relationship when he persuaded his mother, Rose Black, by various means, including undue influence and fraud, to grant three parcels of real estate having a value in excess of $300,000.00 to him, which three parcels of real estate were the subject of a contract between Rose and Marion; Rose having agreed to grant the three parcels of real estate to Marion in consideration of Marion settling a will contest and living with Rose and taking care of her for a period in excess of twenty years. In that case, Samuel filed a motion to dismiss which was allowed by the Court, and Marion appealed the allowance of said motion to the Appeals Court and the Supreme Judicial Court of the Commonwealth of Massachusetts. The Judgment of the Superior Court was affirmed in both instances.

Marion subsequently filed this suit in the United States District Court claiming that she was deprived by the Courts of Massachusetts of her United States Constitutional rights granted to her by the Fifth and Fourteenth Amendments. The basis for this jurisdiction is 28 U.S.C., § 1331(a). Samuel filed a motion to dismiss setting forth the defense of *res judicata*, collateral estoppel and issue preclusion on a prior case which was filed by Rose Black, the mother of Marion and Samuel, against Samuel Black, *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978), which motion to dismiss was allowed and affirmed by the Court of Appeals. The complaint by Rose alleged that Samuel took advantage of her mental incapacity, exercised undue influence and perpetrated a fraud upon her, and thus deprived her of her three parcels of real estate. In that case, on one special question submitted to the jury, the jury found that Rose was not mentally incapacitated. No decision was rendered by the jury on the issue of undue influence and fraud. Marion did not contribute toward the expense of that litigation, never participated in the case as a witness, party or intervenor, nor did she have any control over the litigation. The only relationship between Rose and Marion was that of mother and daughter. Samuel claims that the decision in the case of *Black* v. *Black*, *supra*, is a bar to the bringing of the suit by Marion based on the doctrine of *res judicata*. Marion's suit is for breach of an advantageous relationship and is far different from the claims that were made by Rose against Samuel.

No actual trial was held either in the Superior Court of the Commonwealth of Massachusetts or in the United States District Court. Samuel has successfully pressed his motions to dismiss in both jurisdictions.

Argument.

I. Due Process as Granted by the Constitution of the United States Prohibits the Invocation of *Res Judicata* and Its Subordinate Doctrines Under the Circumstances of this Case.

The United States Supreme Court in the case of *Hansberry* v. *Lee*, 311 U.S. 32 (1940) succinctly stated the doctrine of *res judicata* and its relation to the Fifth and Fourteenth Amendments of the Constitution. In that case, 311 U.S. at 41, the Court ruled that:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under the state constitutions and laws, *subject only* to the requirements of the Constitution of the United States. [Emphasis supplied.] But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co.* v. *Rupp*, 235 U.S. 261, 273.

(Emphasis in original).

Accordingly, it is incumbent upon the Courts to examine this duty on a case-by-case basis and not as a matter of form invoke the Judicial made doctrine of *res judicata* and its subordinates, which doctrine, when wrongfully applied under the guise of judicial economy, deprives a party of her constitutional rights. The District Court judge did not take into consideration that when the doctrine of *res judicata* is exercised,

it deprives a litigant of his day in court and to justify that deprivation, the Court must search each and every facet of the present litigation and attempt to apply those principles which have been enunciated by the Courts to either estop or not estop the present litigant. Those principles have been stated most recently in the matter of *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1970) at page 329.

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the *identical issue* which stand squarely against their position.

(Emphasis supplied).

The doctrine of *res judicata* is constantly being refined and invoked by the Courts and its subordinate principles of collateral estoppel, issue preclusion, claim preclusion and virtual representation, but it has not been applied by the Courts that no party shall be estopped or barred from litigating an issue or a claim when a non-party has not been given in the underlying litigation, either directly or indirectly, a full and fair opportunity to present evidence and argument.

Recently, the United States Supreme Court, in *Allen* v. *McCurry*, 449 U.S. 90, 94-95, decided December 9, 1980, has stated that the principle of *res judicata* should be invoked when:

> Under res judicata, a final judgment on the merits of an action precludes the parties of their privies from relitigating issues that were or could have been raised in that action. *Cromwell* v. *County of Sac.* 94, U.S. 351, 352, 24 L.ed. 195. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a

party to the first case. *Montana* v. *United States*, 440 U.S. 147, 153, 59 L.ed.2d. 210, 99 S.Ct. 970. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost of vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication . . . . But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel *cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.* (Emphasis supplied.) *Montana* v. *United States, supra*, 440 U.S. at 153, 59 L.ed.2d 210, 99 S.Ct. 970; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra*, 402 U.S. at 328-329, 28 L.ed.2d 788, 91 S.Ct. 1434 at page 317 . . . 449 U.S. at 94-95.

In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. This understanding of §1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exist: *Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.*

Id., at 101. (Emphasis supplied).

Marion is not attempting to relitigate federal issues decided after a full and fair hearing in a state court and claiming that

the state court's decision may have been erroneous. She is attempting to litigate a cause of action not existing at the time of the prior litigation. She was not represented, expressly or impliedly, nor was she privy to any of the parties. True, her future interests were involved, but she was not a party, she did not have the same attorney and, in fact, she did not have any attorney to represent her in the prior litigation.

II. Marion, Not Being in Privity with Her Mother in the Prior Litigation, Should Not Be Estopped.

In order for the Court to estop Marion, the Court had to make a finding that she was in privity with her mother, and then the doctrine of res judicata would apply. This Court in the case of *Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 578-79 (1974) discussed the doctrine of res judicata and the requirements of privity and stated: "Because the respondent's suit involves a different cause of action, it is not precluded by res judicata. For res judicata is only to bar repetitious suits involving the same cause of action."

Marion having a different cause of action, to wit: procuring the breach of an advantageous relationship should not be barred or estopped from having her day in court by the claim that she was in privity with her mother. Privity is sometimes defined as an elusive concept. *See*, *Griffith* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), at page 1071.

The Court of Appeals in affirming the District Court's allowance of the motion to dismiss is depriving Marion of her constitutional right to not be deprived of her property rights without due process of law. The constitutional issue did not surface until the Supreme Judicial Court had acted. The Court of Appeals in their decision relied on *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974), which is distinguishable from the complaint before the Court. In the *Lovely* case, the parties are the same

and they litigated all of the issues in the State Court, and an attempt was made by the disappointed party to relitigate the same issues except he is now claiming malicious and unconstitutional use of the state process to be evicted from certain premises.

Marion was never a party and is claiming a different cause of action.

The Court of Appeals stated that Marion should have asserted her claim of being deprived of her constitutional rights in the State Court. That ruling of the Court of Appeals presupposes that Marion knew that the State Courts were going to act unconstitutionally.

In this present case, the depriver of the constitutional rights is not a party to the suit, not the executive branch or the legislative branch of any governmental body, but the judicial branch, itself, by wrongfully invoking the doctrine of res judicata and its subordinate principles.

III. Marion Should Not Be Barred, because Her Cause of Action Was Not in Existence until After the Conclusion of the Prior Litigation.

The tort for interference with a prospective advantage is discussed in *Law of Torts*, William L. Prosser, Third Edition, page 475; the earlier law being that there was no recovery when there was an interference with an expected gift or legacy under a will. However, since that time, the doctrine of interference with an advantageous relationship has been expanded and includes the allowance of a claim that is being made by Marion. The District Court judge erred when he stated that this theory has never been applied by the Massachusetts Courts. *See, Monach* v. *Koslowski*, 322 Mass. 466, 78 N.E.2d 4 (1948), it was alleged that the defendant, the daughter of a testator, did tortiously conduct herself so that

she deprived the plaintiff, another daughter, of her inheritance. A demurrer (motion to dismiss) was filed; the objection being that the plaintiff had a plain, complete and adequate remedy at law. The Supreme Judicial Court stated at 322 Mass. 470, 78 N.E.2d 6-7:

> There are strong intimations in our decisions that one who has been deprived of a devise, legacy or gift which a testator or donor would have given to him but for the wrongful interference of another may maintain an action of tort against the latter for the recovery of damages. *Lewis* v. *Corbin*, 195 Mass. 520. *Ross* v. *Wright*, 286 Mass. 269. *Keegan* v. *Norton*, *ante*, 158. It has also been intimated that one ought not to be allowed to profit by his own wrong, and that the property which he acquired by a fraud which prevented another for whom it was intended from receiving it may be impressed with a constructive trust for the benefit of the latter. *Brignati* v. *Medenwald*, 315 Mass. 636, 638. A remedy in equity where the plaintiff may lay hold of the property in the hands of the wrongdoer would be preferable in many cases to an action of tort. See Scott, Trusts, § 489.4; Pomeroy, Equity Jurisprudence (5th ed.) § 1054c. Damages at best are only an approximation of the loss, while relief in equity, by requiring the wrongdoer to transfer to the intended devisee or legatee that which would have gone to him but for the fraud of the former, gives the intended beneficiary exactly what he would have received in the absence of such fraud....
>
> The bill sufficiently alleges that, but for the wrongful interference by the defendants with the attempt of the decedent to make a new will giving the plaintiff one-half of his property, the plaintiff would have received this share of the property, and presents a case where a court of equity will impose a constructive trust for the benefit of the plaintiff to the extent of this share of the property which the defendants have wrongfully acquired.

(citations omitted).

The present cause of action came into existence when the title to the three parcels of real estate ultimately vested in Samuel by the decision of the Supreme Judicial Court in the case of *Black* v. *Black*, *supra*.

The elements of the tort for interference with an advantageous relationship are malice, intent, causal relationship, damage, existence of an advantageous relationship that is legal, that the defendant had knowledge of the existence; and that there would be a likelihood that the beneficiaries of the advantageous relationship would ultimately be given the property. *See*, 45 Am. Jur. 2d, *Interference, II Elements*, § 3-13. Accordingly, until Rose was unable to convey the property by either will or grant, the plaintiff was not damaged, and Rose lost complete control of the property only after the decision by the Supreme Judicial Court, *Black* v. *Black*, *supra*.

The District Court judge, in his Memorandum, states that Marion was attempting for the first time in the United States District Court to litigate a new cause of action, namely, the tortious interference with an advantageous relationship. The judge erred. Marion's complaint in the Superior Court of the Commonwealth of Massachusetts also alleged that there was a tortious interference with an advantageous relationship and, in fact, cited the case of *Monach* v. *Koslowski*, *supra*.

By the allowance of the motion to dismiss, the District Court and the Court of Appeals have deprived Marion of the basic fundamental rights protected by the Constitution of the United States. Marion has never had, even, a vicarious day in court and should not be denied that day.

IV. The Federal Courts In the Various Circuits Are Not Acting Consistently on the Rule of Law Which the First Circuit Court of Appeals Attempted to Set Forth In Its Decision in the Case at Bar.

The Court of Appeals, in its decision, relied on the case of *Lovely* v. *Laliberte*, *supra*. In that action, the plaintiff and the

defendant were the original parties in a case which had a hearing on the merits and the appellant, Lovely, attempted to relitigate the same issues but under the guise of a violation of his civil rights as stated in 42 U.S.C., § 1983. The Court dismissed his action stating that he had the opportunity to raise this issue in the State Courts.

The District Court of New York, in the case of *Friarton Estates* v. *City of New York*, 525 F.Supp. 1250 (D.N.Y. 1981) has ruled that prior state court proceedings cannot bar federal court consideration on matters which were not actually litigated and determined in the state action. Marion has never litigated her cause of action. The *Friarton* case further held that Federal District Courts must act where state procedural law was inadequate to allow full litigation of constitutional claim and where state procedural law, though adequate in theory, was inadequate in practice.

As previously stated in this petition, the State Courts were the deprivers of the Constitutional Rights of Marion and she did not realize that she lost them until after the state court's adjudication which dismissed her complaint.

The Court of Appeals, in the case of *Ross* v. *International Brotherhood of Electrical Workers*, 634 F.2d 453 (9th Cir. 1980) reached a different conclusion from the Court of Appeals in this case. The 9th Circuit Court ruled that a state court judgment against a financial secretary of the local union in his defamation action against vice president of the International was not *res judicata* as to a subsequent claim for alleged tortious interference with advantageous financial relationships with the Local.

The crowning glory of inconsistency on the part of the various Circuit Courts of Appeal as it relates to res judicata is stated in the case of *Tomanio* v. *Board of Regents*, 446 U.S. 478 (1980). In that case, the District Court in New York found that *res judicata* would not bar consideration of a Section 1983 claim in the Federal Court, if the constitutional claim

was not actually litigated and determined in a prior state court proceeding. The Court of Appeals affirmed the lower court's decision and when the matter was heard by the Supreme Court, it was decided on the Statute of Limitation question and there was no discussion as to whether or not the doctrine of *res judicata* was either rightfully or wrongfully applied in that case. It is incumbent upon this Court that the matter presented to the Court in this Petition be heard for many reasons; the first reason being that the collateral estoppel defense set up in Marion's claim is completely contrary to the doctrine of *res judicata*. It has been stated many times that Marion was never a party, nor in privity with her mother; and that the offenders of the deprivation of her constitutional rights was the Judicial Branch of the government by their interpretation of the judge made doctrine of res judicata and in an attempt to effect judicial economy. The second reason to consider this petition is that under the provisions of Rule 17 of the Rules of the Supreme Court, the various circuits have failed to be consistent in their interpretation of whether or not the constitutional question, if it is not raised at the state court level, can be raised in the federal court level. It is a serious conflict between the various Courts of Appeal, and this Court should act and rule in order to avoid future inconsistencies on the part of the Courts of Appeal.

Conclusion.

It is respectfullly submitted to this Court that Marion Kaplan being deprived of her day in court will never have another opportunity to present her claim for deprivation of her constitutional rights to any court, and that a writ of certiorari should issue to review the judgment and opinion of the

United States Court of Appeals for the First Circuit, which for the first time brought into issue whether or not Marion should have raised her constitutional questions at the lower level. The Court of Appeals failed to consider the doctrine of *res judicata* as stated in *Blonder-Tongue* v. *University Foundation, supra.*

Respectfully submitted,

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